

Substituting a new party after the expiration of the limitation period following the Court of Appeal’s judgment in:

Adelson and Las Vegas Sands Corporation

V

Associated Newspapers Limited¹

1. When granting permission to appeal in Adelson Sir Henry Brooke remarked that “CPR 19.5(3) is ‘notoriously causing problems’”, to which Lord Phillips CJ added “Indeed it is. There are conflicting decisions of this Court in relation to its effect. We propose by this judgment to clarify this difficult area of procedural law”².
2. That conflict arose because of the interpolation of Jacob and Hooper LJ’s judgment in the Court of Appeal in Morgan Est v Hanson Concrete³ which rejected the test developed under the pre-CPR decision of The Sardinia Sulcis⁴ and in doing so trod on the toes of their brethren in the Court of Appeal who had either applied or acknowledged the relevance of the test in The Sardinia Sulcis in several appeals when dealing with the application of CPR 19.5(3).

¹ [2007] EWCA Civ 701

² at para 5

³ [2005] EWCA Civ 134, [2005] 1 WLR 2557

⁴ [1991] 1 Lloyd’s Rep 201

3. Where Limitation has expired and you realise you have the wrong Claimant or the wrong Defendant or you need to add a C or a D then you need to make an application for substitution or addition of a new party.

4. Most of the problems in this area arise out of the difference, sometimes elusive, between an error of identification and an error of nomenclature. An error of identification will occur where a C identifies an individual as the person who has caused him an injury, intends to sue that person, describes him in the pleadings by the correct name, but then discovers that he has identified the wrong person as the person who has injured him. An error of nomenclature occurs where C identifies the correct person as having caused him injury, but describes him in the pleadings by the wrong name.⁵

The legislative framework (my italics throughout)

Limitation Act 1980, Section 35

- (1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced –
 - (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
 - (b) in the case of any other new claim, on the same date as the original action.

- (2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either –
 - (a) the addition or substitution of a new cause of action; or

⁵ Adelson at para 29

(b) the addition or substitution of a new party;

and “third party proceedings” means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.

(3) Except as provided by Section 33 of this Act *or by rules of court*, neither the High Court nor any county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.

...

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, *and subject to any further restrictions the rules may impose*.

(5) The conditions referred to in subsection (4) above are the following –

(a) ...

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is *necessary* for the determination of the *original* action.

(6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as *necessary* for the determination of the *original* action unless either

–

(a) the new party is *substituted* for a party whose name was given in any claim made in the original action in *mistake* for the new party’s name; or

- (b) *any claim already made in the original action* cannot be maintained by or against an existing party *unless* the new party is *joined* or substituted as plaintiff or defendant in that action.

- (7) ...

- (8) Subsections (3) to (7) above shall apply in relation to a new claim made in the course of third party proceedings as if those proceedings were the original action, and subject to such other modifications as may be prescribed by rules of court in any case or class of case.

CPR Part 19 rule 5

- 19.5 – (1) This rule applies to a change of parties after the end of a period of limitation under –
- (a) the Limitation Act 1980;

 - (b) the Foreign Limitation Periods Act 1984; or

 - (c) any other enactment which allows such a change, or under which such a change is allowed.
- (2) The court may add or substitute a party only if –
- (a) the relevant limitation period *was current* when the proceedings were started; and

 - (b) the addition or substitution *is necessary*.
- (3) The addition or substitution of a party is necessary only if the court is satisfied that –
- (a) the new party is to be *substituted* for a party who was named in the claim form *in mistake* for the new party;

 - (b) the claim cannot properly be carried on by or against the original party *unless* the new party is *added or substituted* as claimant or defendant; or

- (c) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party.
- (4) In addition, in a claim for personal injuries the court may add or substitute a party where it directs that –
- (a)(i) section 11 (special time limit for claims for personal injuries); or
 - (ii) section 12 (special time limit for claims under fatal accidents legislation), of the Limitation Act 1980 shall not apply to the claim by or against the new party; or
- (b) the issue of whether those sections apply shall be determined at trial.

Note by way of contrast: r.17.4(3) (17.4 amendments to statements of case after the end of a relevant limitation period): the court may allow an amendment to correct a *mistake* as to the name of a party, but only where the mistake was *genuine* and *not one which could cause reasonable doubt as to the identity of the party in question*.

Note that s.35(6)(a) and 19.5(3)(a) refer only to the substitution of a party and not to the addition of a party.

5. In relation to 19.5(3)(a) the mistake envisaged in relation to the name of C is one under which the name used for C is not the name of the person wishing to sue. Such a mistake is likely to be made by an agent of the person intending to sue. Where C is a company the mistake will always be that of an agent, but identifying the person intending to sue may create difficulties. The mistake envisaged in relation to D is that the name used for D is not the appropriate name to describe the person that C intends to sue. The rule envisages a D

identified by C but described by a name that is not correct. In either case the mistake that the rule envisages is one of nomenclature, not of identification⁶ (you have the right attributes for D, landlord, occupier, contracting party etc but you have the wrong name).

6. Adelson was an application under CPR 19.5(3)(a) in a claim for libel brought by one natural person and one corporate person. No problem arose in relation to the natural person. By application it was sought to add C3 and C4 in substitution of C2 in relation to certain parts of the claim, C2 remaining in the claim in relation to other parts of it. Tugendhat J rejected the application on two grounds: as libel is an individual claim, each of the proposed C's had their own claim so that the amendments went beyond substituting a party but were in fact adding separate claims, which claims could be added as amendments pursuant to CPR 17.4 but no such application had been made; accepting that a mistake had been made but holding that no mistake had been established that fell within 19.5(3).

7. The Court of Appeal were prepared to allow the addition of C3 and C4, acknowledging that in the circumstances it would be breaking new ground for 19.5(3), but declined C's appeal on the basis no satisfactory evidence had been placed before the court explaining the mistake so that the court could be satisfied that a mistake had been made that fell within the rule.

⁶ Adelson at paras 31-33

The Sardinia Sulcis

8. In the pre-CPR decision in The Sardinia Sulcis in relation to RSC Order 20 rule 5, the Court of Appeal laid down the following approach to a rule which was very close in wording to that of CPR 17.4 and had an affinity with 19.5:

In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given... In all these cases it was possible to identify the intending plaintiff or the intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise.⁷

9. Substitution could be made where the right description of the party had been made but attributing the wrong name to the party but could not be made where the wrong description of the party had been made and the wrong name attributed. The court eschewed the approach that substitution could be made simply on the basis that a C always intends to sue the person who is liable for the wrong which he has suffered (or that it was always intended that the party with the cause of action would sue).

10. The court put forward as a test for substitution whether the intending C or D could be identified by reference to a description which is specific to the particular case (e.g. landlord, employer, owner etc). If the party could be so identified then the amendment is one of name so that substitution will be permitted; where the party could not be so identified then it will involve in

⁷ at page 207, Lloyd LJ

many cases the description of another party rather than simply another name. The nature of the claim, therefore, usually provides the answer to the problem.⁸

11. Adelson stipulates that as s.35 LA was intended to reflect O.20 r.5 and rules 17.4 and 19.5 (in so far as they relate to limitation) have s.35 as their authorising legislation, then they are both (despite the difference in wording in 19.5) successors to O.20 r.5. The two rules should be read together.⁹
12. If the new rules follow the old rule, with s.35 as their conduit, then as a matter of principle the reasoning that was applied to the old rule ought to follow through as well and therefore the authorities under the old rule are of relevance (albeit of diminishing relevance over time).

Gregson v Channel Four Television Corporation

13. In Gregson v Channel Four Television Corporation¹⁰ May LJ repeated (in a case where amendment was allowed under CPR r. 17.4(3) and argument by the party resisting the application that only CPR r.19.5 applied was rejected) that the civil procedure rules being a new procedural code there was no basis for supposing that the new rules were intended to replicate, or were intended not to replicate, former provisions and that it was not generally appropriate to

⁸ at page 209, Stocker LJ

⁹ at para 44

¹⁰ [2000] EWCA Civ 214

refer to authorities decided under the former rules to decide what the new rules mean or how they should be applied.¹¹

14. Adelson plainly takes the point, as allowed by May LJ, that 19.5 was an exception to the general rule on authorities under the RSC not being applicable under the CPR.¹² It accepted the approach to substitution and 19.5 as applied in Horne-Roberts v SmithKline Beecham Plc¹³ (CA), Parsons v George¹⁴ and Kessler v Moore & Tibbits¹⁵. Adelson is determinative of this point.

15. The court in Gregson observed in relation to the contrast between 19.5 and 17.4(3) that 19.5 applies where the application is to substitute a new party for a party who was named in the claim form in mistake for the new party whilst 17.4(3) applies where the intended party was named in the claim form but there was a genuine mistake as to the name of the party and no one was misled.¹⁶ If you are suing the occupier of premises and believe X was the occupier at the material time but it was in fact Y, then 19.5 applies; if you are suing the occupier of premises and believe X is his name when in fact it is Y then 17.4(3) applies (and yes, the distinction can be more apparent than real).

16. Peter Gibson LJ put matters this way:

¹¹ at para 16

¹² at paras 44 and 47

¹³ [2001] EWCA Civ 2006, [2002] 1 WLR 1662

¹⁴ [2004] EWCA Civ 912, [2004] 1 WLR 3264

¹⁵ [2004] EWCA Civ 1551

¹⁶ at para 18

The circumstances are that a party has been named in the claim form in mistake for another person. Nothing more is said about the mistake, but it is clear from the rule as a whole that the relevant mistake is one necessitating a change of parties. By comparison and contrast with r17.4(3) that mistake is not a mere mistake as to a name such as causes no reasonable doubt as to the identity of the party in question but is something more fundamental which can only be cured if a new party is substituted.¹⁷

17. Put bluntly, 19.5 is concerned with the capacity of the parties in the litigation and whether the named party fulfils that capacity and whether the new party will fulfil that capacity, whilst 17.4(3) is purely concerned with errors as to name.

18. In practice, aside from situations where you have instituted proceedings and made a minor error in naming a company but where there are no companies with similar names or where service has been effected at the correct address and there is no one else there who could be confused with the named party, the two rules will always be closely related because to identify to a court that you have made an error as to name only will involve reference to the capacity in which you are suing or the capacity of the party sued as the mistake has to have been genuine and *not one that would cause a reasonable doubt as to the identity of the party in question*. That much occurred in Gregson where in providing an exposition of the error (Channel Four Television Company Limited (a dormant company) rather than Channel Four Television Corporation) it was necessary to refer to the capacity of the would be D (the

¹⁷ at para 29

party responsible for broadcasting an allegedly libellous programme and website).

Morgan Est v Hanson Concrete

19. The Court of Appeal in the form of Jacob and Hooper LJJ fired a torpedo in the direction of The Sardinia Sulcis in Morgan Est v Hanson Concrete. The court decided that the right description/wrong name approach did not describe the full ambit of rule 19.5. the court observed that O.20 r.5 was not devised to implement s.35 Limitation Act 1980 whilst r 19.5 was made under that section. This latter observation was one of 6 reasons why the court felt able not to follow the previous decisions of the court.

20. Adelson as we have seen begs to differ, and Adelson carries the field, the reasoning in Morgan Est is not to be followed.¹⁸ So Jacob LJ's requiem for The Sardinia Sulcis, "The Sardinia Sulcis should be allowed to sink back to the ocean bottom. It muddies the waters."¹⁹, was in the event premature.

Moving along

21. The general approach is to apply the rule with regard to the overriding objective but bearing in mind that the limit of the rule must be the limit of the empowering section, s.35 Limitation Act 1980.

22. To apply the rule in the typical case: first has the limitation period expired? If yes, then is the substitution of the new party necessary? The answer to that lies

¹⁸ Adelson at paras 22 and 69

¹⁹ at para 37

in whether it is to be substituted for an existing party who was named in mistake for it. Was the original party named in “mistake” for the new?

23. In Morgan Est the court did not feel that the provision of evidence to explain the mistake need be too exacting. It did not go so far as to suggest that you could dispense with it but accepted what it described as “rather meagre, muddled and second-hand evidence in support of the application” as being sufficient on that occasion²⁰. Although Adelson dealt with an application where evidence was adduced as to how the error came to be made or what would have happened if the error had not been made²¹ it makes clear that it expects that evidence to be forthcoming although there may be occasions when a submission or submissions alone would be sufficient.²² In Adelson the minimum content to accomplish the desired aim of substitution would have been evidence to establish that those responsible for the Particulars of Claim were under a mistake as to the “group structure or the roles played by the members of the group and, but for that mistake, would have included as Claimants the Third and Fourth [proposed] Claimants.”²³

24. Although prejudice is a relevant consideration, as the court is determining whether to exercise a discretion in favour of an applicant or whether to refrain from doing so, neither the Act or the rule makes prejudice the sine qua non of an application, i.e. if it is present then the application will be refused and if it

²⁰ at para 41

²¹ at para 67

²² at paras 67, 69, 71-73

²³ at para 69

is absent the application will be successful; it will depend on the nature of the prejudice.

26. A ubiquitous piece of prejudice will be the loss of a limitation defence. The courts are sometimes sniffy about limitation defences notwithstanding that they exist under a Parliamentary regime (albeit that Parliament has enacted or enabled measures that will ameliorate the rigours of limitation in various circumstances) but they are not quite so sniffy this time. Keene LJ in Horne-Roberts had been instinctively reluctant to accept an interpretation of s.35(6) LA which might allow substitution of a new D unconnected with the original D and unaware of the claim until after expiry of the limitation period, but felt that the potential injustice could be avoided when the court considered the exercise of its discretion²⁴. In that particular instance Adelson observed that a court would be unlikely to exercise its discretion favourably to the amendment.²⁵

27. The question of explanation relates specifically to “mistake” and prejudice relates to the exercise of discretion so that deficiency in the former should not necessarily prevent exercise of the latter. However, the consideration of these two aspects cannot be totally discrete to each other, the explanation or inadequacy or lack of it must be an element in whether to exercise the discretion or not as it is C who is seeking the exercise of the discretion not D; prejudice and its absence are purely considerations in relation to a D (C does not suffer prejudice as such by the application or non-application of the rule

²⁴ at para 44

²⁵ at para 57

but as a consequence of the “mistake” that has lead him to apply under the rule).

28. Adelson did not deal with delay as a factor in the decision whether or not to accede to an application but in dealing with Gregson it did not express any disagreement with the view taken there: *it is clear that the overriding objective of the CPR requires all litigants, especially those who have delayed starting the proceedings, to progress the litigation with all proper speed. If they do not, and if, further, they need the court’s permission to substitute or add a new party, delay will be a relevant consideration in the exercise of the court’s discretion.*²⁶

Pre-Adelson: re-floating The Sardinia Sulcis?

Weston v Gribben

29. In Weston v Gribben²⁷ the Court of Appeal (Lloyd, Hallett and Sedley LJ) accepted aspects of the Morgan Est approach, but were not quite so cavalier in how that approach was to be applied. 19.5 is to be viewed in the (1) statutory context of s.35 Limitation Act 1980 and the overriding objective (2) in the factual context of the nature of the claim made (3) the amendments sought to be made (4) the evidence as to the nature and circumstances of the mistake which it is said was made in respect of the original claim.²⁸

²⁶ at para 23

²⁷ [2006] EWCA Civ 1425

²⁸ at para 39

30. The test they applied is whether you could make the change of name sought without significantly changing the claim as pleaded. As the focus under s.35(6) is on the substitution of a new party “for a party whose name was given in any claim made in the original action” so attention needed to be focussed on the “claim made in the original action” in relation to which the original party’s name is said to have been used by mistake for that of the proposed substitute.²⁹ This pushes things back toward The Sardinia Sulcis but Adelson felt it went too far and that in so far as this test extends wider than the Sardinia Sulcis test it should not be relied upon.³⁰
31. However Adelson and Weston are at one on just because it was a mistake to sue in the name of someone who could not bring such a claim it does not of itself make it a mistake for the purpose of the rule. For instance, a conscious and deliberate tactical decision would not be a relevant mistake.³¹ They also insist that there has to be evidence before the court of what mistake was made. If there is no evidence of what the mistake was then the applicant would not be able to satisfy the “mistake” requirement under 19.5(3)(a) and would therefore not be within the rule in any event. As the court is dealing with the exercise of a discretion it needs to have material before it on which it can exercise that discretion.³²

²⁹ at paras 40-41

³⁰ at para 56

³¹ Weston at para 51; Adelson at para 73

³² Weston at para 54; Adelson at paras 67, 69, 71

33. Though there is an implication in Adelson that there may be circumstances in which it would not be necessary to adduce evidence of a mistake³³, it would be a highly risky strategy to proceed in reliance on that implication and make an application without evidence of the mistake assuming that your application will be treated as one of the exceptions.

Summary

34. In summary Adelson:
- i. Refloats and refits The Sardinia Sulcis in all her old glory;
 - ii. Disables Gregson as it relates to the applicability of authorities under RSC O.20 r.5 (in particular The Sardinia Sulcis) to CPR 17.4 and 19.5, they do apply;
 - iii. Refits Weston in so far as the test adumbrated there is wider than that of The Sardinia Sulcis;
 - iv. Sinks Morgan Est so that it disappears into the murky unfathomable depths of legal history.

NB: Jacob LJ was a member of the court in Adelson.

³³ at para 71: Leading Counsel had said below “It was not thought that it was a useful use of costs or proportionate to chase with the old firm of solicitors why the mistake was made.” *That statement was not a satisfactory alternative for evidence* (the implication being that there are occasions where a more substantive submission might do).

Recent pre-Adelson application

Broadhurst v Broadhurst

35. In Broadhurst v Broadhurst³⁴ (Edward Bartley Jones QC, both 19.5(3)(a) and 19.5(3)(b) applications) the court detected a tension between Morgan Est and Weston and found that as regards the 19.5(3)(a) application a different outcome would have been arrived at if the Morgan Est approach had been applied rather than the Weston approach.

36. The court did conclude that 19.5(3)(a) could only be used in an application for substitution, it could not, despite the opening words of the rule and the words of the Act, be utilised to add a party. The court also had to consider whether the same new party as had sought to be joined under 19.5(3)(a) could be joined under 19.5(3)(b), which rule does not include “mistake” as an element. The court thought that mistake was as pertinent to 19.5(3)(b) as much as to (a) and if it were not that would “drive a coach and horses through the undoubted requirement for “mistake” in 19.5(3)(a)” and relied on Weston at para 26:

Both rules 17.4(3) and 19.5 require that there should have been a mistake as to a party to the claim, whether claimant or defendant ... Gregson ... pointed out [29] that the kind of mistake relevant under rule 19.5 is by no means so limited as that to which rule 17.4(3) applies:

The circumstances are that a party has been named in the claim form in mistake for another person. Nothing more is said about the mistake, but it is clear from the rule as a whole that the relevant mistake is one necessitating a change of parties. By comparison and contrast with r.17.4(3) that mistake is

³⁴ [2007] All ER (D) 522

not a mere mistake as to a name such as causes no reasonable doubt as to the identity of the party in question but is something more fundamental which can only be cured if a new party is substituted.

37. I am not sure that “mistake” can be imported into 19.5(3)(b) as a necessary element to that rule. The rule makes perfectly good sense without it and is sufficient in its breadth to cover circumstances in which the change under the rule is brought about by a mistake having been made. Lloyd LJ in Weston is surely not going any further than the scope of the passage in Gregson that is being cited and the case live before himself, i.e. 19.5(3)(a). So Broadhurst may have raised a new “conflict” for the Court of Appeal to grapple with, this time under 19.5(3)(b).

Postscript

38. In Prescott v Dunwoody Sports Marketing³⁵ the Court of Appeal (Lawrence Collins and Toulson LJJ) accepted that the power under CPR 19.2 in relation to joinder and substitution of parties exists after judgment as well as before.

19.5(3)(a) approach to getting substitution

- A. The claim form and/or pleading should, where it is intended to substitute a D, be clear as to the capacity of the party that it is intended to sue (e.g. landlord, occupier, highway authority, hospital trust etc) and where it is intended to substitute C the capacity which gives rise to C’s entitlement to sue.

- B. The substitute party should be able to be inserted into the claim form and pleading without there needing to be substantial amendment to the causes of action or defence (where a D is added it may be material to identify the manner in which D has come to be relevant e.g. the title of relevant property (unbeknownst to C at the time limitation expired) has devolved on D).
- C. The application should be supported by sufficient evidence of the alleged mistake and its genesis so that the court can be satisfied the application comes within the rule and it has material upon which to exercise its discretion.
- D. The application should deal with any apparent prejudice that may relate to D or the absence of any apparent prejudice that may relate to D;
- E. The application should be made without undue delay.

19.5(3)(b) approach to addition or substitution

- A. The application should be supported by sufficient evidence of why it is necessary that the new party be added.
- B. The joining of the new party should not require the addition of a new claim or any substantial alteration of the existing claim (any alterations should essentially be only those required to make clear the capacity of the new party and its relevance to the existing claim together with any cosmetic alterations as may be necessary to the claim form and pleadings).

- C. The application should be supported by sufficient evidence of the process by which the C or D was identified as being appropriate to the original claim and why the proposed new party had not been identified as necessary to the bringing of the original claim.
- D. The application should deal with any apparent prejudice that may relate to D or the absence of any apparent prejudice that may relate to D.
- E. The application should be made without undue delay.

Opposing applications to substitute or to add a party

- A. Attack any shortcoming in the essentials of an application.
- B. Scrutinise the explanation being given as to why a substitution or addition is necessary with a view to demonstrating any inherent inadequacy with it, its incompatibility with how matters have proceeded, its being in conflict with other facts that relate either to the claim or the way in which the litigation has proceeded.
- C. If no explanation has been given point out forcibly that the applicant has not brought themselves within the rule (certainly) of 19.5(3)(a) and (possibly) of 19.5(3)(b) or provided material essential for the exercise of judicial discretion under either rule.

- D. Expose any inconsistency between the claim as brought and the new party who is to be introduced.
- E. Expose any substantive amendment to the claim that will be necessitated by the substitution or addition of the new party.
- F. Put forward the prejudice, if any, that your client will suffer if the substitution or addition is permitted, but if there will be no prejudice, concede that.
- G. Deal with any prejudice that C may allege, remembering that the purpose of the rule is to overcome the prejudice caused by the mistake or non-joinder.
- H. If delay in the making of an application is a factor say so, don't be put off by any lack of prejudice and press that part of the overriding objective is to deal with cases expeditiously. It is perhaps only going to be in exceptional circumstances that an application could successfully be opposed on the grounds of delay alone; but delay may prove to be the straw that breaks the camel's back where other shortcomings are demonstrated and it comes down to the exercise of judicial discretion.
- I. Press any additional delay that may be caused as a result of the joining of the new party and/or the alteration of statement's of case, this will probably be a more potent avenue than simple delay in making the application.

Authorities

[I have been very crude in the summarising of the factual elements of the cases]

1. Gregson v Channel Four Television Corporation [2000] EWCA Civ 214, a 17.4(3) case; the original D was an inactive subsidiary company and C sought to substitute the broadcaster of the programme and publisher of the website in its place; no one was misled by the mistake; correct and intended party named in claim form but there was a mistake as to the name; substitution permitted; suggestion that 19.5 applied, rejected.
2. Horne-Roberts v SmithKline Beecham Plc [2001] EWCA Civ 2006, [2002] 1 WLR 1662 (CA), a 19.5(3)(a) case; error made as to proper D as a result of a mistake as to who had manufactured the material complained of; substitution permitted.
3. Parsons v George [2004] EWCA Civ 912, [2004] 1 WLR 3264 (CA), a 19.5(3)(a) case; error made as to name of Landlord where it was always intended by C to sue those persons who answered the description "Landlord", the error was an obvious one, the new party was not misled, the amendment would cause no prejudice. Substitution permitted; 19.5(3)(b) not ruled upon.
4. Kessler v Moore & Tibbits [2004] EWCA Civ 1551, a 19.5(3)(a) case; intention to sue negligent solicitor where the firm had been taken over by another firm but the solicitor had not moved to the new firm; error as to being able to sue naming the new firm as D; substitution permitted.
5. Morgan Est v Hanson Concrete [2005] EWCA Civ 134, [2005] 1 WLR 2557 (CA), a 19.5(3)(a) case; wrong contracting party named as Claimant; sought to add two further companies, one as contractor and owner of the legal title to the cause of action in substitution of the original C and the other the company with the benefit of the cause of action. Substitution permitted, addition of a further C also permitted under 19.5(3)(c).
6. Weston v Gribben [2006] EWCA Civ 1425, 150 Sol Jo LB 1463, 19.5(3)(a) and (b) case; naming of C was not a mistake but was made on the basis that W was sole administrator of

company sought to be substituted and was thereby entitled to sue on its behalf in his own name; formulation of the claim would change markedly if substitution were made, W not by his pleading appearing to be asserting a cause of action belonging to the company; in addition, as W was held not to have made the mistake he gave evidence in relation to, then there was no evidence before the court of what mistake he did make and so could not be within the rule; 19.5(3)(a) application rejected; 19.5(3)(b) application rejected: unnecessary to join new party so that W could maintain claim of 2/3 interest in certain property as claim was bad in law in any event.

7. Broadhurst v Broadhurst [2007] EWHC 726 (Ch), [2007] All ER (D) 522, a 19.5(3)(a) and (b) case; company in part the owner of vehicles the subject of the claim; no explanation, satisfactory or otherwise, was put forward as to how it had come about that a claim form and pleading had been settled whereby C was pursuing a cause of action that rested with the company; therefore there was no evidence of a qualifying mistake within 19.5(3)(a) as there was no evidence that C bringing the claim was a mistake, company to be joined in addition to C, adding company would significantly change the claim as C's claim under his partnership agreement with D would be augmented by the company's claim against D (although C ought also to be a D for these purposes) for sums due to it from the partnership; no prejudice to D in joinder of company, no undue delay in applying for joinder; 19.5(3)(a) and (b) applications rejected, but if the elements of the rules had been satisfied then discretion in favour of joining would have been exercised.

8. Adelson and Las Vegas Sands Corp v Associated Newspapers Ltd [2007] EWHC 997 (QB) and [2007] EWCA Civ 701 supra.

22nd July 2007

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